IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 446

WILLIS ALLEN, ROY G. OWENS, and CAMPAIGN COMMITTEE FOR CALIFORNIA BILL OF RIGHTS INITIATIVE CONSTITUTIONAL AMENDMENT, INC., a corporation,

Petitioners,

VS.

ARTHUR JAMES McFADDEN and FRANK M. JORDAN as Secretary of the State of California,

Respondents.

BRIEF OF RESPONDENT McFADDEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STANLEY A. WEIGEL,
LANDELS AND WEIGEL,
275 Bush Street, San Francisco 4, California,
Counsel for Respondent McFadden.

PRINAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Cases, Textbooks and Statutes Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 446

WILLIS ALLEN, ROY G. OWENS, and CAMPAIGN COMMITTEE FOR CALIFORNIA BILL OF RIGHTS INITIATIVE CONSTITUTIONAL AMENDMENT, INC., a corporation,

Petitioners,

VS.

ARTHUR JAMES McFADDEN and FRANK M. JORDAN as Secretary of the State of California,

Respondents.

BRIEF OF RESPONDENT McFADDEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT OF THE CASE.

Action of the State Court.

The court below, the Supreme Court of the State of California, in *McFadden v. Jordan,* 32 A.C. 355, 196 P. (2d) 787 (Tr., pp. 111-133), held that the proposal in an initiative petition (Tr., pp. 14-26) was an attempted revision of the State Constitution, rather than amendment thereof, and that since the State Con-

stitution provides for its revision only by a constitutional convention, but makes no provision for revision by initiative, the proposal was not entitled to a place upon the ballot. The pertinent provisions of the State Constitution relating to revision are contained in its Article XVIII, Section 2. (Appendix hereto, page ii.) Those relating to initiative amendment of the State Constitution are contained in its Article IV, Section 1, the relevant portions of which appear in the Appendix hereto commencing at page i.

The Supreme Court of California issued a peremptory writ of mandate commanding the Secretary of State of the State of California to refrain from submitting the initiative to the electors of the State. (Tr., p. 133.) It is this action of the State Supreme Court which the petitioners seek to have this Court review.

The Initiative Measure Involved.

The petitioners here were proponents of an initiative proposal designated by them as the "California Bill of Rights". A proposed initiative constitutional amendment, it was exceedingly multifarious. In part: It would have made the State Constitution enunciate the sundry ethical, economic and political pronouncements of its proponents (Tr., p. 14); it would have created a powerful new branch of the State government, a so-called "Pension Commission", and installed five named individuals as the commissioners for six-year terms (Tr., p. 15); it would have set up an elaborate system of pension and other payments involv-

ing classification of citizens (Tr., p. 16); it would have legalized wide varieties of gambling under the control of the "Pension Commission" (Tr., pp. 17-20); it would have eliminated, both for the state and for all its political subdivisions, any source of tax revenue except a tax of "$2 per $100 of gross income" (Tr., pp. 20-21); it would have placed regulation of healing arts under another powerful commission, the "California State Board of Naturopathic Examiners", mandatorily installing five named individuals as the first members of that board (Tr., pp. 21-24); it would have required re-apportionment of the State Senate, prohibited cross-filing in primary elections and fixed the method of choosing committees of the State legislature (Tr., pp. 24-25); it would have regulated public lands and inland waters, as well as various types of mining (Tr., pp. 25-26); it would have prohibited legislation touching upon any matter covered by the measure, repealed any existing State constitutional provisions in conflict with it (Tr., p. 26); and it would have made court decisions "adversely, or at all", affecting either the measure or its administration subject to popular vote and ineffective until approved by a majority vote of the electors of the State "at the next general election which occurs subsequent to 130 days after any such decision or order shall become final". (Tr., p. 26.)

Respondent's Statement of the Questions Presented.

1. Do petitioners have the interest requisite to invoke the jurisdiction of this Court?

2. Have all matters here before the Court been rendered academic by the initiative amendment of the California Constitution, adopted by the electorate on November 2, 1948, and now in effect, which provides that no initiative constitutional amendment "shall hereafter be submitted to the electors if it embraces more than one subject, nor . . . become effective for any purpose."?

3. Does the highest court of a state deny any Federal right to proponents of a purported initiative constitutional amendment by deciding that their measure is an attempted revision of the State Constitution not sanctioned by its provisions governing the initiative process in that State?[1]

Summary of Argument.

1. Since there are here no personal or private rights of petitioners to be vindicated, they are but self-constituted spokesmen "of a constitutional point of view" and cannot invoke the jurisdiction of this Court.[2]

---

[1]The claim of petitioners that it does appears chiefly to be grounded in Article IV, Section 4, of the Constitution of the United States, which provides that the United States shall guarantee to every state in the union a republican form of government. Petitioners also contend that the construction put upon the State Constitution by the State court violates, in some unspecified way, rights guaranteed to them by the Ninth and Tenth Amendments to the Constitution of the United States, as well as by the Federal Civil Rights Statute, 8 U.S.C.A., Sec. 43.

[2]Paraphrasing and quoting in part *Coleman v. Miller*, 307 U.S. 433 at 467, post.

2. The petition invites this Court to perform an idle act in view of the amendment to the California Constitution which became effective December 15, 1948, and now prohibits submission to the electorate of any initiative constitutional amendment embracing more than one subject and further provides that no such amendment shall become effective for any purpose.

3. Whatever rights petitioners have spring from the provisions of the Constitution of the State of California which create and control the initiative in that State. The question as to whether a particular initiative measure is sanctioned by those State constitutional provisions is local and its final determination by the State court is conclusive.

4. The privilege of the proponents of a State initiative measure to obtain its submission to the State electorate is not guaranteed by Article IV of the Constitution of the United States nor by any other provision thereof nor by any Federal statute.

Argument.

I. THE PETITIONERS LACK THE REQUISITE PERSONAL OR PRIVATE INTEREST TO INVOKE THE JURISDICTION OF THIS COURT.

Contrary to the implications of the argument of petitioners here, they speak neither for the people of the State of California as a whole, nor for the entire State electorate, nor for any substantial portion

of either. The fact is quite otherwise. The proponents of the State initiative—three individuals and a corporation—are here insisting that they have Federal rights under which they may compel the entire electorate to pass upon their proposal.

They are not officials of the State government. Indeed, there is no evidence in the record that they are even qualified voters of the State of California.[3] If none of the petitioners is at least a qualified voter of the State of California, they have no standing here.

Assuming, *arguendo,* that the individual petitioners are qualified voters under the laws of the State, do they then have any standing here? The decisions of this Court indicate that they do not. The Governor and other officers of the State of Indiana, seeking review of a decision of the Supreme Court of that State forbidding submission to the electorate of a new State constitution, were, in *Marshall v. Dye,* 231 U.S. 250, declared to have no personal rights before this Court sufficient to invoke its review of the decision of the State court. In *Coleman v. Miller,* 307 U.S. 433, Mr. Justice Frankfurter, expressing the views of Mr. Justice Roberts, Mr. Justice Black and Mr. Justice Douglas, as well as his own, pointed out that legislators of the State of Kansas lacked the personal or private interest requisite to invoke certiorari to the

[3]Petitioner Owens declares at the outset of an affidavit filed with the court below that he "is a resident of the County of Los Angeles and has resided in the State of California for the past 19 years". (Tr., p. 54) Even such inferences as might be made from this do not apply to petitioner Willis Allen and obviously do not apply to the corporate petitioner.

Supreme Court of the State of Kansas on its decision as to ratification by the Kansas legislature of the Child Labor Amendment (*Coleman v. Miller,* supra, 307 U.S. 433, commencing at page 460), Mr. Justice Frankfurter stating that

> ". . . The requisites of litigation are not satisfied when questions of constitutionality though conveyed through the outward forms of a conventional court proceeding do not bear special relation to a particular litigant. The scope and consequences of our doctrine of judicial review over executive and legislative action should make us observe fastidiously the bounds of the litigious process within which we are confined . . ." (307 U.S. at 462-4.)

and that

> "We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it . . ." (307 U.S. at 467.)

The cited cases are recent expressions of the settled rule of this Court (subject to narrow exceptions not here applicable) that

> ". . . in every case coming to the Supreme Court, whether invoking the exercise of its original jurisdiction or seeking review of the decision of state or lower federal court, it is a jurisdictional prerequisite that the Supreme Court be satisfied that the suit involves the vindication of rights personal to the parties thereto, which are en-

titled to and susceptible of protection by judicial action in that proceeding, and which are being invaded, or the invasion of which is certain and impending.

"No one is immune from making this jurisdictional showing. The sovereign, the individual, the corporation, the unincorporated association—each alike must establish its personal interest and status to invoke the exercise of the federal judicial power in the particular controversy before the Supreme Court. That Court is itself the judge whether the requirement is met: it is not controlled either by ruling or assumption upon this point by the court below, whether state or federal tribunal. Since the requirement is jurisdictional, it will be raised by the Court *sua sponte* when ignored by the parties."

Jurisdiction of the Supreme Court of the United States, Robertson and Kirkham, 1936, pp. 469-71. (Citations omitted.)

It is a fair presumption, of course, that petitioners here are not acting from purely eleemosynary purposes, but nowhere does it appear that they have the requisite personal or private interest to invoke the jurisdiction of this Court.

II. PETITIONERS SEEK THE PERFORMANCE OF AN IDLE ACT BY THIS COURT SINCE THE ADDITION OF SECTION 1c TO ARTICLE IV OF THE CALIFORNIA CONSTITUTION, RECENTLY ENACTED BY THE PEOPLE, NOW AND HEREAFTER PROHIBITS THE SUBMISSION OF ANY INITIATIVE AMENDMENT EMBRACING MORE THAN ONE SUBJECT.

Although the election of November 2, 1948, at which petitioners planned to have their purported constitutional amendment submitted, has been held, petitioners state that a decision in their favor by this Court "would place it on the next general election ballot, Nov. 7, 1950." (Petition, p. 10.) They ground this conclusion in that language of the State Constitution (a portion of the 1911 amendment establishing the initiative process) which reads that "if for any reason any initiative or referendum measure proposed by petition as herein provided, be not submitted at the election specified in this section, such failure shall not prevent its submission at a succeeding general election . . ." (Petition, p. 10.)

But whether or not the questioned mandamus was properly issued and whether or not the purported initiative proposition could have been submitted if the mandate were dissolved has now become an academic question.

It has been rendered so by the action of the people of California in amending their Constitution at the general election of November 2, 1948, to add the following Section 1c of Article IV:[4]

---

[4]Shortly after the widely publicized decision of the California Supreme Court here attacked, this amendment was adopted by a vote of 1,973,761 to 963,387. Pursuant to a provision of Article

> "Sec. 1c. Every constitutional amendment or statute proposed by the initiative shall relate to but one subject. No such amendment or statute shall hereafter be submitted to the electors if it embraces more than one subject, nor shall any such amendment or statute embracing more than one subject, hereafter submitted to or approved by the electors, become effective for any purpose."

There can be no question but that petitioners' so-called California Bill of Rights embraces more than one subject. The most casual examination will confirm it. Petitioners, as intervenors below, admitted it. (Tr., pp. 89, 91, 99.)

Article IV, Section 1c, quoted above, is, of course, the latest amendment to the California Constitution upon the subject with which it deals. Therefore, it prevails over the earlier 1911 amendment of the State Constitution upon which petitioners rely.[5] The practical effect of the new amendment, overwhelmingly adopted by the State electorate, is that neither respondent Secretary of State nor any other State official now has the power to submit petitioners' so-called Bill of Rights, even if the State Supreme Court should dissolve the writ of mandate. Nor can that Court, a creature of and bound by the State Constitution, now have any power to issue a positive man-

---

IV, Section 1 (Appendix, p. i), the amendment became effective on December 15, 1948, five days after the official declaration of the vote by the Secretary of State of California.

[5]Cases supporting this elementary doctrine are collected in 16 *C.J.S.* p. 67, Footnote 39.

date for submission to the electorate of petitioners' proposal embracing so many unrelated subjects.

It is clear that the people of the State of California do not share the views of petitioners as to the desirability of multifarious initiative constitutional amendments. Their overwhelming vote, in addition to rendering the present petition purposeless, has the effect of turning against petitioners themselves whatever force may lie in the thesis of petitioners' entire argument, i.e., that the will of the people must not be thwarted by the courts. Article IV, Section 1c, expresses the will of the California electorate, not the desire of any "self-constituted spokesman of a constitutional point of view."[6]

III. NO FEDERAL QUESTION IS PRESENTED BY THE PETITION FOR CERTIORARI.

A. Whether or not the proponents of a state initiative constitutional amendment have complied with the controlling provisions of a state constitution is a matter for final determination by the state court of last resort.

The initiative process here involved is entirely a creature of the California State Constitution. The scope of the initiative power and the manner of its exercise are delineated by that constitution. Whatever rights petitioners have in this proceeding stem from it and it alone.

As a matter of State law, it is well settled (and was well settled long prior to the activities of petitioners

---

[6] *Coleman v. Miller*, 307 U.S. 433, 467, supra.

in behalf of their so-called California Bill of Rights) that the State Supreme Court had and has the power to exclude from the ballot initiative proposals found not to comply with constitutional or statutory provisions governing the California initiative. In *Gage v. Jordan,* 23 Cal. (2d) 794, 147 P. (2d) 387, the State Supreme Court prohibited an initiative constitutional amendment from being submitted to the State electorate on the ground that the constitutional requirements for submission were not met. In *Clark v. Jordan,* 7 Cal. (2d) 248, 60 P. (2d) 457, the same court ruled similarly as to an initiative measure because of the failure to comply with a State statute supplementing the State Constitution in its provisions regarding exercise of the initiative. In *Mayock v. Kerr,* 216 Cal. 171, 13 P. (2d) 717, the same court sustained a refusal of a county registrar of voters to file initiative petitions failing to meet formal requirements designated in the State Constitution.

Here, as in the cited cases, the California Supreme Court has done no more than to measure an initiative proposal against the requirements of the State law governing exercise of the privilege created by State law and found the proposal wanting. No more than interpretation and application of the State Constitution and State law is involved. In this situation, "the well settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the Constitution and laws of the State." *Luther v. Borden,* 7 How. 1, 40. The rule thus stated has often been

reiterated and applied as, for example, in *King v. Order of United Commercial Travelers,* 333 U.S. 153; *American Federation of Labor v. Watson,* 327 U.S. 582; *Huddleston v. Dwyer,* 322 U.S. 232, 236; *Thornton v. Duffy,* 254 U.S. 361; *Pacific Gas & Elec. Co. v. Police Court,* 251 U.S. 22, 24; and *Wailes v. Smith,* 157 U.S. 271.

B. The decision of the California Supreme Court is not here reviewable as an alleged violation of the constitutional guarantee to the States of a republican form of government; nor does it deny to petitioners any right they have under any other provision of the Federal Constitution or statutes.

The principal ground for review urged by petitioners is an alleged violation of the guarantee to the states of a republican form of government, embodied in Article IV, Section 4, of the Federal Constitution. The claim is without merit. The holding of this Court in 1849 in *Luther v. Borden,* 7 How. 1, that the constitutional guarantee of a republican form of government to the states is political and not justiciable has been uniformly followed in a wide variety of subsequent decisions. Thus, in *Taylor v. Beckham,* 178 U.S. 548, a petition for a writ of error to review the decision of the Kentucky Court of Appeals in an action to determine the right to the governorship was denied and the contention of the petitioners that Federal jurisdiction could be grounded in Article IV, Section 4, was rejected. In *Marshall v. Dye,* 231 U.S. 250, supra, a writ of error to review a state court decree enjoining the submission of a constitution for ratification by the voters of Indiana was denied for

want of jurisdiction and the contention that the judgment of the state court contravened Article IV, Section 4, was rejected as presenting no justiciable controversy.

In *Pacific States Telephone & Telegraph Co. v. Oregon,* 223 U.S. 118, and in *Kiernan v. Portland,* 223 U.S. 151, the claim that the initiative process itself involved a breach of the guarantee of Article IV, Section 4, was rejected on the same ground.[7] Surely, if the broad grant by a state constitution of the right of initiative presents no justiciable controversy, neither does a limitation upon that right.

Petitioners' attempt to raise a Federal question by resort to the Ninth and Tenth Amendments to the Constitution (not urged upon the court below) is without substance. It is elementary that these amendments express inherent limitations upon the Federal government, not upon the government of any of the several states. Petitioners' effort here to invoke these amendments is aimed against action of the State government, or of a portion thereof, and not against the exercise of any Federal power. Equally without substance are petitioners' efforts to anchor a Federal question in 28 U.S.C.A., Section 1257, which merely states the grounds upon which certiorari will lie to a state court, or in 8 U.S.C.A., Section 43, the Civil Rights Act. These statutes provide for jurisdiction and for remedies. Neither establishes any substantive

[7]The same claim as to the referendum process was rejected on the same ground in *Ohio ex rel. Davis v. Hildebrand,* 241 U.S. 565.

rights, privileges or immunities. They could not, nor do they purport to, create any substantive Federal rights not grounded in the Constitution of the United States. And petitioners show no violation of any constitutional guarantee.

IV. CONCLUSION.

The petitioners lack the requisite interest to invoke the jurisdiction of this Court in this matter. The people of the State of California, by their recent amendment of their constitution, have effectively precluded petitioners from imposing petitioners' measure upon them. In any event, petitioners present no Federal question. Therefore, the petition for certiorari should be denied.

Dated, San Francisco, California,
February 9, 1949.

Respectfully submitted,
STANLEY A. WEIGEL,
LANDELS AND WEIGEL,
Counsel for Respondent McFadden.

(Appendix Follows.)

Appendix

Portions of the Constitution of the State of California Deemed to Have An Important Bearing.

Constitution of California, Article IV, Section 1:

"Section 1. The legislative power of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the legislature."

* * * * * * *

". . . Upon the presentation to the Secretary of State of a petition certified as herein provided to have been signed by qualified electors, equal in number to 8 per cent of all the votes cast for all candidates for Governor at the last preceding general election, at which a Governor was elected, proposing a law or amendment to the Constitution, set forth in full in said petition, the Secretary of State shall submit the said proposed law or amendment to the Constitution to the electors at the next succeeding general election occurring subsequent to 130 days after the presentation aforesaid of said petition, or at any special election called by the Governor in his discretion prior to such general election . . ."

* * * * * * *

"Any act, law or amendment to the Constitution submitted to the people by either initiative or referendum petition and approved by a majority

of the votes cast thereon, at any election, shall take effect five days after the date of the official declaration of the vote by the Secretary of State."

* * * * * * *

"If for any reason any initiative or referendum measure, proposed by petition as herein provided, be not submitted at the election specified in this section, such failure shall not prevent its submission at a succeeding general election, . . ."

Constitution of California, Article IV, Section 1c:

"Sec. 1c. Every constitutional amendment or statute proposed by the initiative shall relate to but one subject. No such amendment or statute shall hereafter be submitted to the electors if it embraces more than one subject, nor shall any such amendment or statute embracing more than one subject, hereafter submitted to or approved by the electors, become effective for any purpose." (Initiative constitutional amendment adopted November 2, 1948, effective December 15, 1948.)

Constitution of California, Article XVIII, Section 2:

"Sec. 2. Whenever two-thirds of the members elected to each branch of the Legislature shall deem it necessary to revise this Constitution, they shall recommend to the electors to vote at the next general election for or against a convention for that purpose, and if a majority of the electors voting at such election on the proposition for a convention shall vote in favor thereof, the Legislature shall, at its next session, provide by

law for calling the same. The convention shall consist of a number of delegates not to exceed that of both branches of the Legislature, who shall be chosen in the same manner, and have the same qualifications, as members of the Legislature. The delegates so elected shall meet within three months after their election at such place as the Legislature may direct. At a special election to be provided for by law, the Constitution that may be agreed upon by such convention shall be submitted to the people for their ratification or rejection, in such manner as the convention may determine. The returns of such election shall, in such manner as the convention shall direct, be certified to the executive of the State, who shall call to his assistance the Controller, Treasurer, and Secretary of State, and compare the returns so certified to him; and it shall be the duty of the executive to declare, by his proclamation, such Constitution, as may have been ratified by a majority of all the votes cast at such special election, to be the Constitution of the State of California."